Thirteenth Supplement to Memorandum 94-11

Administrative Adjudication: Exemption Request of Agricultural Labor Relations Board

The Agricultural Labor Relations Board requests an exemption from the proposed administrative procedure act. Exhibit pp. 1-11. A copy of the statutory provisions applicable to ALRB hearings is attached as Exhibit pages 12-22.

ALRB indicates that the proposed procedures vary so significantly from the scheme envisioned by the Agricultural Labor Relations Act as to amount to a rewriting of the statute. They would be forced to opt out of all the optional provisions, and the ones they could not opt out of would present serious problems for their operations. They indicate that they have by regulation already adapted most of the basic procedural reforms found in the proposed act for use in their proceedings.

ALRB notes that the California Agricultural Relations Act is modeled after the National Labor Relations Act, with unique decision-making processes geared to the labor dispute resolution process. Proceedings under the California statute are exempt from the California administrative procedure act, just as proceedings under the NLRA are exempt from the federal Administrative Procedure Act.

The staff finds these arguments in favor of exempting ALRB proceedings from the administrative procedure act persuasive. In addition, the staff believes that the field of labor relations is a specialty area serviced by a specialty bar. We see no significant advantage to the public in applying the general administrative procedure act provisions to it.

We would add an express exemption to the Agricultural Labor Relations Act:

> **Lab. Code § 1144.5 (added). Exemption from Administrative Procedure Act**
>
> 1144.5. Part 4 (commencing with Section 641.110) of Division 3.3 of Title 1 of the Government Code does not apply to a proceeding under this part.
>
> **Comment**. Section 1144.5 makes clear that the adjudicative provisions of the Administrative Procedure Act to not apply to

proceedings by the Agricultural Labor Relations Board.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA PETE WILSON, *Governor*

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September 14, 1993

NATHANIEL STERLING
Executive Secretary
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Subject: **Comments on Tentative Recommendation: Administrative Adjudication by State Agencies**

Dear Mr. Sterling:

The Agricultural Labor Relations Board (ALRB) respectfully requests that it continue to be exempt from the provisions of the proposed Administrative Procedures Act (APA) in its proposed form. The ALRB has operated under a very formal and highly regulated hearing process for 18 years. What the APA reform purports to accomplish already exists for the most part under our process. Many of the procedural improvements in hearing and prehearing processes proposed by the APA that are workable under the ALRA, such as early disclosure of non-employee witnesses, have been substantially incorporated into the ALRB's procedures through its 1991 rulemaking package.

More importantly, the provisions of the proposed APA would either seriously impair the operation of the Agricultural Labor Relations Act (ALRA or Act) or so modify the basic statutory scheme of the ALRA as to amount to a substantial rewriting of the Act.

Finally, the opting out process is costly, time-consuming and would not alleviate serious derogations to the comprehensive labor relations scheme enacted in the ALRA.

Background

The ALRB is one of the agencies that has been exempted heretofore not only from the obligation to use Administrative Law Judges from the Office of Administrative Hearings, but from the existing Administrative Procedures Act in its entirety, except for rulemaking procedures. (Gov. Code sec. 11501.) The National Labor Relations Board (NLRB), whose statutory scheme and operations were consciously adopted by the Legislature when the ALRA was enacted, has been exempt from the federal Administrative Procedures Act, except that it is authorized to conduct

rulemaking proceedings. For the reasons set forth below, the proposed Administrative Procedures Act (APA) is, if anything, even more inappropriate for application to the ALRA than the existing Administrative Procedures Act.

To retain its present specialized and expert character, one consciously adopted by the Legislature from the National Labor Relations Act (NLRA), the ALRB would have to opt out of most of the provisions of the APA. However, even if the ALRB opted out of all the optional terms of the APA in order to retain the statutory scheme adopted by the Legislature, the APA provisions that do not allow opting out (herein called mandatory provisions) would either seriously disrupt the operations of the ALRB or modify the legislatively adopted statutory scheme in such fundamental ways that, we are confident, the drafters of the APA could not have intended from their proposals.

To the extent that mandatory provisions were ultimately deemed contrary to the ALRA's express statutory language and therefore inapplicable to the ALRA, as discussed below, there would be no point in imposing them on the ALRB. To the extent that particular procedural improvements in the APA may be desirable, APA section 612.140 would allow the ALRB to adopt those provisions even if it were exempted. In our view, whatever residual benefits to the ALRB that may reside in the APA can be incorporated by the ALRB under APA section 612.140.

Most of the procedural improvements in hearing and prehearing processes proposed by the APA that are workable under the ALRA, such as early disclosure of non-employee witnesses, have been substantially incorporated into the ALRB's procedures through its 1991 rulemaking package.

Most importantly for our request for exemption, if the ALRB were subject to the terms of the APA and therefore were bound by its mandatory terms, particularly Chapter 9, Decisions, it is foreseeable that the most important function of the ALRB, elections to choose collective bargaining representatives, would either become impossible to conduct as originally authorized by the Legislature, or, at best, would be rendered essentially inoperative for a period of several years.

This disruption or inadvertent amendment would not advance the stated goals of the APA, because most of the objectives of the APA are already in place at the ALRB:

* Substantially all of our procedures are embodied in regulations formulated in rulemaking proceedings.

* The ALRB has adopted most of the hearing and prehearing procedures, insofar as they are appropriate for the context in which the ALRA operates, by its 1991 rulemaking proceeding.

* The ALRB's decisions, numbering about 1,000 at this time, are all published and precedentially binding.

* The decisional law interpreting our regulations, to the extent they are not already embodied in our own regulations and published decisions, are generally available in county law libraries and larger libraries, as well as practitioners' offices. They include approximately 50,000 published decisions of the National Labor Relations Board (NLRB), and approximately 5,000 published federal circuit decisions and 500 United States Supreme Court decisions, under a substantially identical statute dealing with the same subject matter. This NLRA material is available not only through the official reports of the courts and the NLRB, but also through major publishing services including Bureau of National Affairs and Commerce Clearing House.

* Labor matters in virtually all other forums, most of them substantially greater in the volume of cases generated (NLRB, federal district and superior court, arbitration), are handled by a specialized labor bar. Making our proceedings more accessible to non-specialists would probably not divert any substantial amount of business away from this specialized bar to other practitioners.

The substance of the reforms, while perhaps beneficial in many other areas of administrative procedure, conflicts with the basic scheme of the ALRA. Unless the ALRB is exempted from both the mandatory and optional terms of the APA, for the reasons explained below, the APA could constitute a rewriting of the ALRA and would impair the operations of major terms of the ALRA either permanently or until the full cycle of our administrative proceedings and judicial review is completed. In many cases, this process could last four to five years.

Mandatory APA Provisions and Their Impact on the ALRA

Agencies are not permitted to opt out of the following provisions of the APA: Part 1, all chapters, Part 4, Chapter 3, Chapter 4, Chapter 8, Article 2, Chapter 9 and Chapter 10. Several of these mandatory terms may be in conflict with the statutory scheme of the ALRA, or could cause significant harm to the operation of the ALRB without countervailing benefit.

The Impact of the APA on the Board's Election Procedures

An example of the APA's impact on the ALRB relates to the ALRB's election process.

One of the ALRB's two principal functions is to investigate and certify the collective bargaining status of bargaining units consisting of agricultural employees. If a labor organization is certified, the employer is required to recognize and bargain with it. The fostering of such relationships, if chosen by the employees in a Board conducted election, is the most important objective of the ALRA, and is the central means of accomplishing the declared statutory objective of promoting peace in the agricultural fields through the statutory scheme laid out by the ALRA. The second principal function of the ALRB, adjudication of unfair labor practices, exists primarily to foster and protect the rights of farmworkers to the free choice of a collective bargaining representative through ALRB elections, and to effective and fair representation should they exercise their right to be represented.

Because of the seasonal character of agricultural work, the Legislature departed from the NLRA by requiring that elections be conducted within seven days of the filing of a petition, or within 48 hours if a majority of employees are engaged in a strike.[1] Full compliance with the APA, even with regulations

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[1] The California Legislature departed from the NLRA model as to the timing of elections. The NLRA provides that virtually all elections conducted pursuant to its terms take place following a hearing. In cases where a hearing is not waived, the median time from filing of petition to preelection decision is 45 days. (NLRB Annual Report, 1989, Table 23, p. 249, (most recent available).) The NLRB's procedures provide that the election shall take place 25 to 30 days following the regional director's decision. (NLRB Representation Case Handling Manual, section 11302.1.) While most NLRB elections are run without a hearing pursuant to stipulation of the parties, the stipulations are arrived at with the only alternative being the direction of election following a hearing. This median lag of 70 days from petition to election would mean that elections could rarely be conducted until after the work force was less than half its annual peak, since few peak seasons in agriculture last 60 days. Both NLRB case law and the ALRA recognize the potential unfairness in conducting an election in an electorate that is not at least half the annual peak level of employment.

providing modified time frames, would make an election within seven days, much less two, impossible. Labor Code section 1153(f) prohibits a union from acting as bargaining agent without having a valid certification from the ALRB. Therefore, the only avenue into or out of collective bargaining rights for farmworkers under the ALRA is through the ALRB's election process. If that avenue is denied or obstructed, the right of farmworkers to effectively select or reject a collective bargaining representative is denied.

To preserve the existing election procedure, the courts would have to hold that the implication of informal election procedures raised by the ALRA's provision for seven-day elections constitutes an express provision of the ALRA contrary to the APA. Even if the courts ultimately conclude that the implication constitutes an expressly contrary provision of the ALRA, the ALRB's election procedure could foreseeably be nullified until all APA issues had been settled, probably by the California Supreme Court, a period that could last from three to four years.

Part 1, Chapter 1 of APA defines "license" in a way that appears to include certifications of unions as collective bargaining representatives of agricultural employees working in bargaining units covered by the ALRA. The APA appears to contemplate that its due process requirements will be met before a "license" is suspended. Under the ALRA, the ALRB must revoke the only significant form of license it issues, a union's certification to act as collective bargaining representative, upon the ALRB's decision on post-election objections or challenged ballots, or upon a vote of the majority of agricultural employees employed by the employer in an election conducted by the ALRB. Even the "granting" of the "license" (certification of representative) would constitute a decision under APA section 610.310(a). Section 610.310(a) defines a decision as "an agency action that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." The duty imposed on the employer to recognize and bargain with a union as the exclusive collective bargaining representative of the employer's agricultural employees clearly imposes "a legal right, duty, [or] privilege."

Section 641.110 could be read to excuse the agency from conducting a hearing where it is not "required by statute" (if referring to statutes other than the APA), but the comment to Section 641.110 begins by stating "an agency must conduct an appropriate adjudicative proceeding before issuing a decision[.]"

Decades of litigation under the NLRA and the ALRA have shown a strong motivation to challenge elections, even with a legal theory much less plausible than that raised by the APA amendments. It is foreseeable that almost every election conducted by the ALRB would be challenged based upon the failure of the election process to comply with the APA. While some judicial decisions have characterized the election process as an investigation of employee desire for representation, these cases arose at a time when the ALRB was not under the APA. It is difficult to see how the preelection process can be made to comply with the APA with the existing statutory time frames. Only if the implication raised in the existing seven-day requirements were held to be an "express contrary statutory provision", would the Board's election process be upheld.[2]

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[2] The employer can only obtain judicial review of an ALRB or NLRB election determination by refusing to bargain if the union wins the election. During the pendency of the judicial review, the bargaining obligation is in effect suspended.

The courts have recognized that in many cases the judicial review process had been abused by the raising of frivolous or insubstantial issues to avoid the potential costs of bargaining and to discredit and thereby eliminate the certified union. To cure the perceived deficiency in the NLRA, which provides no monetary remedy for an unfounded refusal to bargain, the Legislature adopted the "makewhole" remedy, requiring the employer to pay the employees in the certified unit whatever gains they would have received had bargaining proceeded without the test of certification. The California Supreme Court held that where the employer has shown a good faith reasonable basis for its contention that the election was invalid, makewhole will not be imposed, even though the contention is ultimately rejected. (J.R. Norton (1980) 26 Cal.3d 1 [160 Cal.Rptr. 710].)

Since at least one court decision has held that good faith can still be shown even where one court of appeal has adversely decided the issue upon which review of the ALRB's certification is based, it is possible that the procedural issues raised by the APA would be viable grounds for asserting a good faith basis for refusing to bargain until the California Supreme Court resolved all APA issues that could arise in ALRB election proceedings.

The effect of the generalized availability of these theories could be to deny substantially all agricultural laborers in California (in excess of one million persons per year) effective access to the Board's election process, and to render that

Unless the ALRB, or at least its election process, is expressly exempted from the APA, it is reasonable to expect that it would be subject to challenge. The inclination of many employers under both the NLRA and the ALRA to postpone and defeat a collective bargaining obligation imposed by the certification was recognized by the remedial provisions of the ALRA, and by the California Supreme Court in J.R. Norton v. ALRB (1980) 26 Cal.3d 1 [165 Cal.Rptr. 710]. Similarly, incumbent unions could be motivated to resist decertification efforts by litigating the applicability of the APA, since under established law they remain the bargaining agent until they are finally decertified.

Other Mandatory Provisions of APA Conflict With the ALRA's Statutory Scheme

Mandatory Sections 642.210-.230 appear to require the agency to issue decisions upon the application of private parties for decisions. Under section 1149 of the ALRA, the General Counsel has the exclusive and substantially unreviewable discretion to initiate any unfair labor practice cases. This statutory arrangement is copied from section 3(d) of the NLRA, which has been interpreted similarly. While parties can file charges under the ALRA, charges are not pleadings but mere requests for investigations.

The General Counsel's authority over the complaint until opening of hearing has for decades been interpreted to include the ability to withdraw or modify it without leave at least until the opening of hearing. APA section 648.120, another mandatory APA section, provides that the presiding officer may consolidate and sever matters from the proceeding without reference to the stage of the proceedings.

These sections would seriously alter the ALRA's statutory scheme unless read to be inapplicable to the ALRA because of their inconsistency with ALRA section 1149's express statutory grant of authority to the ALRB General Counsel.

Summary of Comment as to Mandatory APA Terms

The ALRB believes, as stated previously, that it should be exempt from the proposed APA in its entirety. The ALRB has already adopted many of the procedural improvements required by the APA,

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process substantially inoperative until the APA issues had been settled by appellate court litigation, a time period that could last four to five years.

and would opt out of most of the nonmandatory APA provisions not already in place. The ALRB would be able to incorporate any other terms of the APA that appeared helpful under APA section 630.140, as it has already done in its 1991 rulemaking package.

Optional APA Provisions

The negative impact of application of the APA's optional terms on the ALRA would appear to fall into the following areas:

* The provision for declaratory decisions would substantially modify the statutory scheme created by the ALRA, which is to encourage employers, unions and employees to adjust their differences with a minimum of governmental supervision.

* The whole process of collective bargaining, arbitration and grievance processing sanctioned by the ALRA is a form of alternative dispute resolution, and therefore, APA provisions for additional alternative dispute resolution are at best, surplusage.

* Existing United States Supreme Court precedent suggests that discovery provisions, like those in the APA, would deny the ALRA's investigative and adjudicative process evidence from employees, upon which these processes are almost completely dependent.

Declaratory Decisions

The availability of declaratory decisions, while potentially useful in some cases, contradicts the statutory scheme of the ALRA. The underlying scheme of both the ALRA and NLRA is to create a system of private negotiations operating with a minimum of governmental supervision. Declaratory judgments could be requested to bring the agency in to give approval at every step of the process. Requests for resolution of disputes over preelection access by unions, plans for preelection speeches by consultants, and bargaining proposals could be submitted to the Board for advance clearance.

The process created and regulated by the ALRA and the NLRA was clearly intended to create private dispute resolving mechanisms free of governmental supervision, except on an after-the-fact basis. The NLRB has throughout its history, or at least since 1948, refused to give advisory opinions, except as to narrow jurisdictional issues. To do so would make the agency the supervisor of labor relations on an ongoing basis as the process

proceeded. While such an experiment may be desirable, it would be such a departure from the underlying private dispute resolution assumed by the legislation as to amount to a substantial amendment of the statutory scheme.

While the Board would have discretion to decline any such requests, there could be substantial pressure or criticism if the Board exercised the declaratory opinion power in any case, but refused it in others. The ALRB would therefore have to exclude itself from the declaratory decision process.

Alternative Dispute Resolution

As to the sections on Alternate Dispute Resolution, the whole framework of collective bargaining and concerted activity is a form of alternative dispute resolution. While most of the disputes addressed through collective bargaining or voluntary negotiations in the framework of protected concerted activities are not legal claims, disputes subject to legal proceedings have often been disposed of in the course of negotiating a new collective bargaining agreement. Well developed case law under the NLRA and ALRA also encourages the creation of grievance and arbitration procedures, and these processes were well developed in the context of labor law before alternate dispute resolution arose in most other fields of law.

NLRA and ALRA precedent provides that our proceedings may be deferred to give the parties the opportunity to resolve them through grievance and arbitration procedures. While the Board would be willing to consider further development of alternative dispute resolution procedures, such mechanisms are highly developed in labor law and the APA's provisions for such procedures would at best add little to the existing statutory scheme and decisional law.

Discovery Provisions and Pleading Practice

The APA provides for liberal discovery compared to what has prevailed under both the ALRA and the NLRA. The reasons for the lack of discovery procedures under both the ALRA and the NLRA are set forth in the ALRB's decision in Giumarra Vineyards, Inc. (1977) 3 ALRB No. 21. These substantially parallel those relied on by the United States Supreme Court in NLRB v. Robbins Tire & Rubber Co. (1978) 437 U.S. 214. That case upheld the NLRB's policy to withhold employee statements unless and until that employee was called as a witness in an unfair labor practice or representation adjudicative hearing. The Court noted that the operation of the NLRB depends almost entirely on the cooperation

of employees in giving written statements. Since employees are subject to innumerable overt or subtle pressures from their employer, the Court recognized that prehearing discovery, as contemplated by section 645.220-.230 could potentially dry up the source of evidence upon which the NLRB's (and ALRB's) processes depend. In this context, the NLRB and ALRB have been reluctant to impose discovery obligations on employers and unions, because they have no discovery access to the most important source of evidence in Board proceedings, i.e., employee statements.

To manage the production of documents shortly before and in hearing, the ALRB has developed significant procedures for formal prehearing conferences that do not exist at the NLRB . These procedures remove many of the disadvantages that otherwise might exist because of the complete absence of discovery.

Section 645.220 allows for extremely liberal pleading practices. For example, any complaint allegation not responded to is deemed to be denied, while under the ALRB's regulations, absence of any response is deemed an admission. (8 Cal. Code of Regs., sec. 20232.) The APA appears to have adopted the assumption underlying the federal rules of civil procedure that the availability of discovery compensates for the lack of precision in pleading. Since the ALRB provides only limited discovery, (NLRB proceedings still have no discovery), relatively precise pleadings are essential to enable the ALJ to maintain effective control in the prehearing conference.

CONCLUSION

Based on the foregoing, it is respectfully requested that the ALRB be exempted from the provisions of the APA. The processes created and regulated by the ALRA, and on the federal level, the NLRA, have been exempted from both the federal and state Administrative Procedures Acts. The procedures created by the APA are so much at variance with the statutory scheme of the ALRA that application of the APA would amount to major modification of the underlying statute.

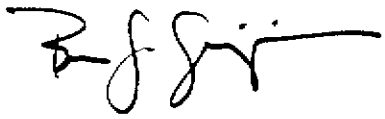
Absent exemption, the ALRB would by rulemaking, opt out of most of the non-mandatory terms of the APA. This would include Article 3 of Part 4, Chapters 1, 2, 5, 6, 7, and most of 8. This would be an expensive exercise and would only partly remedy the damage to the existing statutory scheme caused by application of the APA.

Therefore, it is submitted that the arguments for exemption are compelling in that the ALRA would be seriously modified and

disrupted by the APA. Most of the reforms required by the APA, such as rulemaking, fair hearing and prehearing procedures, and accessibility of precedent, are already in place. The ALRB could continue to incorporate such procedures voluntarily as it has in the past through rulemaking.

Thank you for thoughtfully reviewing the foregoing considerations.

Very truly yours,



BRUCE J. JANIGIAN
Chairman

BJJ/bl

Exhibit

Statutes Applicable to Agricultural Labor Relations Board

Chapter 5. Labor Representatives and Elections

1156. Designated representatives as exclusive for purposes of collective bargaining; Right of employees to present grievances to employer

Representatives designated or selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment. Any individual agricultural employee or a group of agricultural employees shall have the right at any time to present grievances to their agricultural employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect, if the bargaining representative has been given opportunity to be present at such adjustment.

1156.2. Bargaining unit

The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

1156.3. Petition concerning representation of employees; Allegations; Investigation; Election; Filing of objections; Certification of election; Decertification of labor organization on ground of discrimination

(a) A petition which is either signed by, or accompanied by authorization cards signed by, a majority of the currently employed employees in the bargaining unit may be filed in accordance with such rules and regulations as may be prescribed by the board, by an agricultural employee or group of

agricultural employees, or any individual or labor organization acting in their behalf alleging all the following:

(1) That the number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent of his peak agricultural employment for the current calendar year.

(2) That no valid election pursuant to this section has been conducted among the agricultural employees of the employer named in the petition within the 12 months immediately preceding the filing thereof.

(3) That no labor organization is currently certified as the exclusive collective-bargaining representative of the agricultural employees of the employer named in the petition.

(4) That the petition is not barred by an existing collective-bargaining agreement.

Upon receipt of such a signed petition, the board shall immediately investigate such petition, and, if it has reasonable cause to believe that a bona fide question of representation exists, it shall direct a representation election by secret ballot to be held, upon due notice to all interested parties and within a maximum of seven days of the filing of the petition. If at the time the election petition is filed a majority of the employees in a bargaining unit are engaged in a strike, the board shall, with all due diligence, attempt to hold a secret ballot election within 48 hours of the filing of such petition. The holding of elections under strike circumstances shall take precedence over the holding of other secret ballot elections.

The board shall make available at any election under this chapter ballots printed in English and Spanish. The board may also make available at such election ballots printed in any other language as may be requested by an agricultural labor organization, or agricultural employee eligible to vote under this part. Every election ballot, except ballots in runoff elections where the choice is between labor organizations, shall provide the employee with the opportunity to vote against representation by a labor organization by providing an appropriate space designated "No Labor Organizations".

(b) Any other labor organization shall be qualified to appear on the ballot if it presents authorization cards signed by at least 20 percent of the employees in the bargaining unit at least 24 hours prior to the election.

(c) Within five days after an election, any person may file with the board a signed petition asserting that allegations made in the petition filed pursuant to subdivision (a) were incorrect, that the board improperly determined the geographical scope of the bargaining unit, or objecting to the conduct of the election or conduct affecting the results of the election.

Upon receipt of a petition under this subdivision, the board, upon due notice, shall conduct a hearing to determine whether the election shall be certified. Such hearing may be conducted by an officer or employee of a regional office of the board. He shall make no recommendations with respect thereto. If the board finds, on the record of such hearing, that any of the assertions made in the petition filed pursuant to this subdivision are correct, or that the election was not conducted properly, or misconduct affecting the results of the election occurred, the board may refuse to certify the election. Unless the board determines that there are sufficient grounds to refuse to do so, it shall certify the election.

(d) If no petition is filed pursuant to subdivision (c) within five days of the election the board shall certify the election.

(e) The board shall decertify a labor organization if the United States Equal Employment Opportunity Commission has found, pursuant to Section 2000(e)(5) of Title 42 of the United States Code, that the labor organization engaged in discrimination on the basis of race, color, national origin, religion, sex or any other arbitrary or invidious classification in violation of Subchapter VI of Chapter 21 of Title 42 of the United States Code during the period of such labor organization's present certification.

1156.4. Timeliness of petition as dependent on percentage of peak agricultural employment reflected in employer's payroll

Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of the rights included in this part, the board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.

In this connection, the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather the board shall estimate peak employment on the basis of acreage and crop statistics which shall

be applied uniformly throughout the State of California and upon all other relevant data.

1156.5. Prohibition of election following recent valid election

1156.6. Prohibition of election in bargaining unit represented by labor organization recently certified or having extended certification

The board shall not direct an election in any bargaining unit which is represented by a labor organization that has been certified within the immediately preceding 12-month period or whose certification has been extended pursuant to subdivision (b) of Section 1155.2.

1156.7. Collective-bargaining agreement as bar to petition for election; Petition and election concerning decertification of labor organization; Petition accompanied by authorization cards

(a) No collective-bargaining agreement executed prior to the effective date of this chapter shall bar a petition for an election.

(b) A collective-bargaining agreement executed by an employer and a labor organization certified as the exclusive bargaining representative of his employees pursuant to this chapter shall be a bar to a petition for an election among such employees for the term of the agreement, but in any event such bar shall not exceed three years, provided that both the following conditions are met:

(1) The agreement is in writing and executed by all parties thereto.

(2) It incorporates the substantive terms and conditions of employment of such employees.

(c) Upon the filing with the board by an employee or group of employees of a petition signed by 30 percent or more of the agricultural employees in a bargaining unit represented by a certified labor organization which is a party to a valid collective-bargaining agreement, requesting that such labor organization be decertified, the board shall conduct an election by secret ballot pursuant to the applicable provisions of this chapter, and shall certify the results to such labor organization and employer.

However, such a petition shall not be deemed timely unless it is filed during the year preceding the expiration of a collective-bargaining agreement which would otherwise bar the holding of an election, and when the number of agricultural employees is not less than 50 percent of the employer's peak agricultural employment for the current calendar year.

(d) Upon the filing with the board of a signed petition by an agricultural employee or group of agricultural employees, or any individual or labor organization acting in their behalf, accompanied by authorization cards signed by a majority of the employees in an appropriate bargaining unit, and alleging all the conditions of paragraphs (1), (2), and (3), the board shall immediately investigate such petition and, if it has reasonable cause to believe that a bona fide question of representation exists, it shall direct an election by secret ballot pursuant to the applicable provisions of this chapter.

(1) That the number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent of his peak agricultural employment for the current calendar year.

(2) That no valid election pursuant to this section has been conducted among the agricultural employees of the employer named in the petition within the 12 months immediately preceding the filing thereof.

(3) That a labor organization, certified for an appropriate unit, has a collective-bargaining agreement with the employer which would otherwise bar the holding of an election and that this agreement will expire within the next 12 months.

1157. Eligibility to vote in election

All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote. An economic striker shall be eligible to vote under such regulations as the board shall find are consistent with the purposes and provisions of this part in any election, provided that the striker who has been permanently replaced shall not be eligible to vote in any election conducted more than 12 months after the commencement of the strike.

In the case of elections conducted within 18 months of the effective date of this part which involve labor disputes which commenced prior to such effective date, the board shall have the jurisdiction to adopt fair, equitable, and appropriate eligibility rules, which shall effectuate the policies of this part, with respect to the eligibility of economic strikers who were paid for work performed or for paid vacation during the payroll period immediately preceding the expiration of a collective-bargaining agreement or the commencement of a strike; provided, however, that in no event shall the board afford eligibility to any such

striker who has not performed any services for the employer during the 36-month period immediately preceding the effective date of this part.

1157.2. Runoff where no choice receives a majority in election

In any election where none of the choices on the ballot receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

1157.3. Duty of employers to maintain accurate and current payroll lists; Availability to board upon request

Employers shall maintain accurate and current payroll lists containing the names and addresses of all their employees, and shall make such lists available to the board upon request.

1158. Procedure concerning review of order of board made pursuant to section 1160.3.

Whenever an order of the board made pursuant to Section 1160.3 is based in whole or in part upon the facts certified following an investigation pursuant to Sections 1156.3 to 1157.2 inclusive, and there is a petition for review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under Section 1160.8 and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

1159. Parties to legally valid collective-bargaining agreement

In order to assure the full freedom of association, self-organization, and designation of representatives of the employees own choosing, only labor organizations certified pursuant to this part shall be parties to a legally valid collective-bargaining agreement.

Chapter 6. Prevention of Unfair Labor Practices and Judicial Review and Enforcement

1160. Authority of board

The board is empowered, as provided in this chapter, to prevent any person from engaging in any unfair labor practice, as set forth in Chapter 4 (commencing with Section 1153) of this part.

1160.2. Complaint concerning unfair labor practice; Limitations period; Answer; Hearing; Conduct of proceedings

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the board, or any agent or agency designated by the board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the board or a member thereof, or before a designated agency or agencies, at a place therein fixed, not less than five days after the serving of such complaint. No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing, or the board in its discretion, at any time prior to the issuance of an order based thereon. The person so complained against shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the board, any other person may be allowed to intervene in the proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the Evidence Code. All proceedings shall be appropriately reported.

1160.3. Testimony and arguments; Findings; Orders

The testimony taken by such member, agent, or agency, or the board in such hearing shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board, upon notice, may take further testimony or hear argument. If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall

issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part. Where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, upon the preponderance of the testimony taken, the board shall be of the opinion that the person named in the complaint has not engaged in or is not engaging in any unfair labor practice, the board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the board, or before an administrative law officer thereof, such member, or such administrative law officer, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the board, and, if no exceptions are filed within 20 days after service thereof upon such parties, or within such further period as the board may authorize, such recommended order shall become the order of the board and become effective as therein prescribed.

Until the record in a case shall have been filed in a court, as provided in this chapter, the board may, at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

1160.4. Temporary relief or restraining order

The board shall have power, upon issuance of a complaint as provided in Section 1160.2 charging that any person has engaged in or is engaging in an unfair labor practice, to petition the superior court in any county wherein the unfair labor practice in question is alleged to have occurred, or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition, the board shall cause

notice thereof to be served upon such person, and thereupon the court shall have jurisdiction to grant to the board such temporary relief or restraining order as the court deems just and proper.

1160.5. Hearing and determination of dispute involving charge of unfair labor practice within meaning of section 1154(d)(4); Dismissal of charge

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) of subdivision (d) of Section 1154, the board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within 10 days after notice that such charge has been filed, the parties to such dispute submit to the board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

1160.6. Preliminary investigation of certain charges; Injunctive relief or restraining order pending final adjudication; Notice; Hearing; Jurisdiction of court; Service upon labor organization

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (1), (2), or (3) of subdivision (d), or of subdivision (g), of Section 1154, or of Section 1155, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the board, petition the superior court in the county in which the unfair labor practice in question has occurred, is alleged to have occurred, or where the person alleged to have committed the unfair labor practice resides or transacts business, for appropriate injunctive relief pending the final adjudication of the board with respect to the matter. The officer or regional attorney shall make all reasonable efforts to advise the party against whom the restraining order is sought of his intention to seek such order at least 24 hours prior to doing so. In the event the officer or regional attorney has been unable to advise such party of his intent at least 24 hours in advance, he shall submit a declaration to the court under penalty of perjury

setting forth in detail the efforts he has made. Upon the filing of any such petition, the superior court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper. Upon the filing of any such petition, the board shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony. For the purposes of this section, the superior court shall be deemed to have jurisdiction of a labor organization either in the county in which such organization maintains its principal office, or in any county in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate, the procedure specified herein shall apply to charges with respect to paragraph (4) of subdivision (d) of Section 1154.

1160.7. Priority of charges of certain unfair labor practices

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subdivision (c) of Section 1153 or subdivision (b) of Section 1154, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under Section 1160.6.

1160.8. Review of final order of board; Procedure

Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein such person resides or transacts business, by filing in such court a written petition requesting that the order of the board be modified or set aside. Such petition shall be filed with the court within 30 days from the date of the issuance of the board's order. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or

restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

An order directing an election shall not be stayed pending review, but such order may be reviewed as provided in Section 1158.

If the time for review of the board order has lapsed, and the person has not voluntarily complied with the board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein such person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce such order by writ of injunction or other proper process. The court shall not review the merits of the order.

1160.9. Exclusive method of redressing unfair labor practices

The procedures set forth in this chapter shall be the exclusive method of redressing unfair labor practices.